92-1176

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

JOSEPH ISGRO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD M. RÉ
A Professional Law Corporation
888 West Sixth Street
Twelfth Floor
Los Angeles, California 90017
(213) 362-9234
Attorney for Petitioner,
Counsel of Record

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

46 pp

QUESTIONS PRESENTED

1. Whether claims of post-indictment prosecutorial misconduct are only cognizable if the misconduct affected the grand jury's decision to indict, a standard applied by the Ninth Circuit but which can never be met?

2. Whether the Ninth Circuit is correct in its determination that post-indictment prosecutorial misconduct can never be the basis for a motion to dismiss an indictment?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	7
APPENDIX	8

TABLE OF AUTHORITIES

Cases

	Page
Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)	4
Berger v. United States, 295 U.S. 78 (1935)	6
McNabb v. United States, 382 U.S. 332 (1943)	6
Rochin v. California, 342 U.S. 165 (1952)	6
United States v. Gatto, 763 F.2d 1040 (9th Cir. 1985)	6
United States v. Gonsalves, 619 F.2d 1310 (9th Cir. 1982)	6
United States v. Isgro, ____ F.2d ____ 1992 WL341785 (Ninth Circuit, September 1, 1992) (#90-50531)	1
United States v. Isgro, 751 F.Supp. 846 (C.D. Cal 1990)	1, 3
United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974)	6
United States v. Mechanik, 475 U.S. 66 (1986)	5
United States v. Owen, 580 F.2d 365 (9th Cir. 1978)	6
United States v. Russell, 411 U.S. 233 (1973)	6
United States v. Williams, ____ U.S. ____, 60 U.S.L.W. 4348 (May 4, 1992)	3, 4, 5

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

JOSEPH ISGRO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Joseph Isgro, respectfully prays that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit filed as amended November 25, 1992, reversing the order of the United States District Court for the Central District of California which dismissed the indictment against petitioner based upon outrageous prosecutorial misconduct.

OPINIONS BELOW

The citation of the opinion of which review is sought is *United States v. Isgro*, ____ F.2d. ____ 1992 WL341785 (Ninth Circuit, September 1, 1992)(#90-50531). The decision of the United States District Court can be found at *United States v. Isgro*, 751 F.Supp. 846 (C.D. Cal 1990).

JURISDICTION

Petitioner invokes the jurisdiction of this court under 28 U.S.C. § 1254(1).

The United States Court of Appeals entered its amended decision November 25, 1992 upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Joseph Isgro, together with Raymond Anderson and Jeffrey Monka were indicted on November 30, 1989 in a multi-count indictment charging Isgro with RICO violations, mail fraud, payola, the filing of false income taxes and obstruction of justice. The main government trial witness was to be Dennis DiRicco, an attorney and accountant who had represented Isgro. DiRicco had been convicted in the United States District Court for the Northern District of California on money laundering and narcotic offenses.

DiRicco's testimony at his own trial, which the government possessed, but which it withheld from the defendants, was directly contrary on every material point to DiRicco's grand jury testimony and anticipated trial testimony in this case. According to the District Court:

> "That testimony constituted a complete and detailed denial of any wrongdoing not only by [DiRicco] but also by any of the defendants in this case."

During the course of discovery, the government affirmatively represented that all *Jencks* and *Brady* material had been disclosed, while withholding the DiRicco transcript. The petitioner,

therefore, was affirmatively misled concerning the existence of this undisclosed *Brady* and *Jencks* material.

During the course of trial, the defense uncovered the transcript and brought it to the attention of the District Court.

The government attorney responsible for the prosecution of this case lied to the court regarding his possession, knowledge, and withholding of the transcript.

The District Court made detailed findings documenting the withholding of this transcript from the grand jury, the hiding of the transcript from the defense, and the outright lying to the court concerning the existence of the document. Based upon these findings, the District Court dismissed the indictment. 751 F.Supp. 846 *et. seq.*

The District Court determined that a dismissal was appropriate (1) because the grand jury had been misled; (2) because discovery had been improperly withheld from the defendants; and (3) because of the outrageous conduct of the government in lying both to the defense and the Court concerning its possession and knowledge of the withheld documents.

Following the District Court decision, this court decided *United States v. Williams*, ____ U.S.____ 60 USLW 4348 (May 4, 1992). The Court of Appeals concluded that *Williams* undercut one basis of the District Court's decision, namely the government's misleading of the grand jury.

The Court of Appeals, however, went on to determine that *all errors of prosecutorial misconduct, to be cognizable, must bear upon "the grand jury's decision to indict"*. Slip opinion page 13769.

Because the remaining errors, namely withholding discovery from the defense and lying to the District Court, occurred after the return of the indictment, it was impossible to find an effect of these errors upon the decision to indict. In the opinion of the court below, this *ipse dixit* rationale precluded consideration of a motion to dismiss.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals concludes that a motion to dismiss for prosecutorial misconduct must bear upon the grand jury's decision to indict, despite the fact that the errors complained of occurred after the return of the indictment. Irrespective of the egregious nature of the misconduct, the court foreclosed any possibility of a motion to dismiss based upon post-indictment governmental misconduct.

In so concluding, the District Court misapplied the decisions of this Court, is in conflict with decisions of this Court and other Circuits, and establishes a completely unjustified and baseless standard for review of motions to dismiss.

The Circuit Court reaches its erroneous conclusion by isolating language from cases discussing grand jury error, and improperly applying them to all claims of prosecutorial misconduct. In particular, the court's reliance upon the necessity of the misconduct bearing upon "the grand jury's decision to indict" flows from a misunderstanding of this Court's decision in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). In that case, this Court was concerned with a question of grand jury misconduct, and recognized that errors occurring after the return of the indictment were inapplicable to such claims. Quite obviously, in determining whether the grand jury has been misled, post-indictment errors, are irrelevant. This Court neither said, nor, it is submitted, intended to say that such post-indictment errors could not be considered in a claim of post-indictment misconduct.

The court below went on to misapprehend the statement of this Court in *United States v. Williams, supra*, to the effect that the "supervisory power can be used to dismiss an indictment because of misconduct before the grand jury". *Id.* at 4351. While this language recognizes the right of a District Court to exercise supervisory powers to control grand jury error, neither by its terms, nor by logic, does it limit the exercise of supervisory power with regard to other kinds of errors.

A writ of certiorari is appropriate to resolve the conflict which exists between the opinion below and opinions of this Court, and

to settle the conflict which now exists between this published opinion and opinions in the Ninth and other circuits.

The record necessary to be reviewed to decide this issue is limited in view of the factual findings by the District Court which were left undisturbed by the Court of Appeals.

If the published opinion of the Ninth Circuit remains viable, the decision will preclude consideration of motions to dismiss for post-indictment prosecutorial misconduct in all cases arising within the Ninth Circuit, and will lead, almost certainly, to the erroneous resolution of a large number of cases raising the issue of prosecutorial misconduct.

REASONS FOR GRANTING THE WRIT

With a stroke, the Ninth Circuit in the opinion below has crippled the District Court's authority to exercise supervisory powers, and has precluded any motion to dismiss arising from post-indictment prosecutorial misconduct. For, according to the panel opinion, the *only* prejudice which can support a District Court's exercise of supervisory powers to dismiss an indictment is prejudice which bears upon the "the grand jury's decision to indict". *Id.* at 13769.

The decision of the Court of Appeals conflicts with this court's decision in *United States v. Williams, supra.* The majority opinion there recognized that the District Courts maintain substantial power "over their own proceedings". The decision in *Williams* was based upon the perception that the grand jury maintains a separate identity from the judiciary, and thus was not a part of the court's "own proceedings".

The four dissenters in that case echoed these sentiments. In fact, the dissent presumes that the District Court has the power to remedy post-indictment government misconduct, and seeks, from that basis, authority to remedy grand jury misconduct.

Relying on *United States v. Mechanik*, 475 U.S. 66 (1986) the dissent notes that "the standard for judging the consequence of prosecutorial misconduct during grand jury proceedings is essentially the same as the standard applicable to trials."

The Court of Appeals decision, therefore, runs afoul of a long line of decisions by this court which mandate action by the District Court to supervise its own offices, and to remedy prosecutorial abuse. See for example *Berger v. United States*, 295 U.S. 78 (1935).

The Court of Appeals decision is similarly offensive to the notions of supervisory powers outlined by Justice Frankfurter in *McNabb v. United States*, 382 U.S. 332, 340 (1943), and the applicability of such powers to rectify governmental misconduct described in *Rochin v. California*, 342 U.S. 165, 172 (1952) (applying such powers to conduct which "shocks the conscience") and *United States v. Russell*, 411 U.S. 233 (1973) (which acknowledged the outrageous government misconduct defense).

The decision also is at odds with Ninth Circuit authority which recognizes that a District Court "is empowered to dismiss an indictment on the basis of governmental misconduct". United *States v. Gatto*, 763 F.2d 1040, 1045 (9th Cir. 1985); *United States v. Gonsalves*, 619 F.2d 1310 (9th Cir. 1982); *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978). Other circuits have taken a similar position. See for example *United States v. McCord*, 509 F.2d 334, 349 (D.C. Cir. 1974) (serious prosecutorial misconduct may so pollute a criminal prosecution as to require a dismissal of the indictment or new trial, without regard to prejudice to the accused).

The issue here is an important one. The opinion below completely disempowers the District Court from rectifying governmental misconduct occurring in criminal cases. Although it recognized that "the prosecutor's misconduct before the District Court clearly rose to an intolerable level, particularly the misconduct of Mr. Lynch" (slip opinion page 13772) it concluded that, because the post-indictment conduct did not affect the grand jury's decision to indict, the District Court was powerless to act.

The ultimate result is that the government is free to withhold evidence, lie to the court and counsel, and make every effort to illegally and unfairly obtain an advantage over a criminal defendant. If they succeed, they do so at the ignorance of the court and

counsel. If they are discovered, they are in no worse position than if they had followed the law to begin with. The government is given every incentive to lie, cheat, withhold evidence, mislead the court about their possession of exculpatory evidence, and make outright false statements to the court about its contents. Such a global rewriting of the supervisory powers of the court is totally unwarranted.

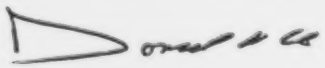
CONCLUSION

For the reasons cited above it is respectfully submitted that a Writ of Certiorari should issue to review the order and amended opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: January 6, 1993

Respectfully submitted,

DONALD M. RÉ
A Professional Law Corporation



By: DONALD M. RÉ
Attorney for Petitioner,
Joseph Isgro

APPENDIX

1. *United States v. Isgro*, ____ F.2d. ____ 1992 WL341785 (Ninth Circuit, September 1, 1992) (#90-50531)
2. *United States v. Isgro*, 751 F.Supp. 846 (C.D. Cal 1990).

APPENDIX 1

No. 90-50531

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOSEPH ISGRO; RAYMOND ANDERSON;
JEFFREY S. MONKA,
Defendants-Appellees.

D.C. No. CR-89-0951-JMI

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
July 10, 1992 — Pasadena, California

Filed September 1, 1992
Amended November 25, 1992

Before: Joseph T. Sneed and Dorothy W. Nelson, Circuit Judges, and John M. Roll, District Judge.*

Opinion by Judge D.W. Nelson

---

* The Honorable John M. Roll, United States District Judge for the District of Arizona, sitting by designation.

SUMMARY

Individual Rights/Constitutional Rights/Criminal Law and Procedure/Prosecutorial Misconduct/Grand Juries/Litigation and Procedure/Defendants and Accused, Rights of, Witnesses

Reversing a district court judgment, the court of appeals held that, although informing the grand jury of a witness' exculpatory testimony about the defendants given at a prior trial or the existence of a transcript of that testimony was not constitutionally required, lying to the district court about the existence and nature of that *Brady* material, and keeping the material from the defense even through trial, was outrageous prosecutorial misconduct, but that, absent prejudice to the defendant, the district court erred in dismissing the indictment with prejudice.

Joseph Isgro, Raymond Anderson, and Jeffrey Monka were indicted by a grand jury on government charges that they were involved in a complex scheme to promote certain musical artists illegally through the use of bribes to officials at local radio stations using money allegedly derived from narcotics trafficking. The government's main witness before the grand jury was Dennis DiRicco, who had been tried and charged in district court for charges involving money laundering and narcotics. DiRicco testified at his trial and a transcript of his testimony was prepared at that time. That testimony conflicted significantly with DiRicco's later testimony before the grand jury that DiRicco had testified at his trial or that a transcript of that testimony had been prepared. As a result, the grand jury returned the indictment without the benefit of DiRicco's previous testimony. Also, during the course of pretrial proceedings, defendants' counsel repeatedly asked the government for all exculpatory materials under *Brady*. The government did not produce the transcript or acknowledge its existence; instead, it repeatedly denied the existence of material tending to exonerate the defendants. The government also assurred the court that it fully understood its obligations to turn over any such materials. While defense counsel subsequently learned of the trial transcript's existence, the content of DiRicco's prior testimony was not discovered by defense counsel until the defendants' trial was well under way. Defense counsel argued the

transcript was *Brady* material concealed by the government. The district court dismissed the indictment with prejudice on the basis of the government's cumulative misconduct. The government appealed.

[1] Initially, the court disagreed with the government's argument that DiRicco's trial testimony was covered by the Jencks Act and that the government was not required to turn it over to the defense until DiRicco actually testified at trial; its failure to disclose the transcript to the grand jury was not misconduct. [2] In light of the purposes behind the Jencks Act, the court failed to see why a trial transcript should be protected from disclosure. [3] The court's holding that trial testimony is not within the scope of the Jencks Act was supported by the language of the statute itself. [4] Joining the Seventh and Fifth Circuits in holding that previous trial testimony does not fall within the scope of the Jencks Act, the court concluded that the government could not justify or excuse its misconduct in this case by invoking the Act.

[5] Concerning the constitutional grounds on which the district court relied for dimissing the indictment, the court noted that the problem with the district court's judgment was that the Ninth Circuit has held that prosecutors simply have no duty to present exculpatory evidence to grand juries. Thus, the court found that there was no abrogation of constitutional rights sufficient to support the dismissal of the indictment.

[6] The district court also invoked its inherent supervisory power to dismiss the indictment because it found that in addition to usurping the role of the grand jury, the government had repeatedly denied to defense counsel and the court the existence of any *Brady* material, misrepresented the contents of the transcript when confronted with it, and intended to keep the transcript from the defense as long as it could, possibly through trial. [7] While the district court was justifiably frustrated with the government prosecutors in this case, the court simply did not find support in Supreme Court and Ninth Circuit case law for its decision to dismiss the indictment. [8] The court noted that the Supreme Court has stated that a court should not use its supervisory powers to mete out punishment absent prejudice to the

defendant. [9] A dismissal exercised under the guise of "supervisory power" is permissible, however, absent a clear basis in fact and law for doing so. Thus, in deciding whether to dimiss an indictment, a court must not only determine whether a defendant has suffered actual prejudice, it must also limit its consideration to those events that actually bear upon the grand jury's decision to dismiss an indictment. [10] In this case, the cumulative conduct complained of was not limited to the grand jury proceedings. However, after *Williams*, that failure was simply insufficient to sustain a dismissal of an otherwise valid indictment. [11] Even if all the misconduct could be considered, it was difficult to identify the prejudice to the defendants. [12] In addition, the Supreme Court as well as the Ninth Circuit have repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure. Thus, under the circumstances, the court believed that the district court would be quite justified in pursuing alternative means of sanctioning the prosecutor, as indicated in *Bank of Nova Scotia*. However, dismissing the indictment was simply an unwarranted "windfall" to the defendants.

COUNSEL

Drew S. Pitt, Assistant United States Attorney, Los Angeles, California, Frank J. Marine, William S. Lynch, United States Department of Justice, Washington, D.C. for plaintiff-appellant United States of America.

Donald M. Re, Los Angeles, California, for defendant-appellee Joseph Isgro W. Michael Mayock, Pasadena, California, for defendants-appellees Raymond Anderson and Jeffrey Monka.

ORDER

The opinion, filed September 1, 1992, is hereby amended as follows: On slip opinion, page 10595, at the commencement of headnote 9, please insert the following text:

> [9] Dismissal of an indictment with prejudice necessarily implicates separation-of-powers principles. *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991); *United States*

> *v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985). This doctrine mandates judicial respect for the independence of the prosecutor. *Simpson*, 927 F.2d at 1091. Dismissal of an indictment with prejudice is the most severe sanction possible. Such dismissal exercised under the guise of "supervisory power" is impermissible absent "a clear basis in fact and law for doing so." *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir. 1977).

The panel voted unanimously to otherwise deny the petitions for rehearing. Judge D.W. Nelson voted to reject the suggestions for rehearing en banc, and Judges Sneed and Roll so recommended.

The full court has been advised of the suggestions for rehearing en bac and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

OPINION

D.W. NELSON, Circuit Judge:

Joseph Isgro, Raymond Anderson and Jeffrey Monka ("defendants") were indicted by a grand jury on government charges that they were involved in a complex scheme to promote certain musical artists illegally through the use of "payola" — payments/bribes to officials at local radio stations — using money allegedly derived from narcotics trafficking. Subsequently, citing prosecutorial misconduct before the grand jury and in pretrial proceedings, the district court dismissed the indictment with prejudice. In so doing, the district court invoked both the defendants' right to a constitutionally sound grand jury process and the court's inherent right to supervise judicial proceedings.

The government appeals, arguing that its conduct did not justify a dismissal of the indictment. We reluctantly agree. Based on recent Supreme Court case law, we find that the district court erred in dismissing the indictment, and we now reverse.

BACKGROUND[1]

Defendants were indicted by a grand jury on November 30, 1989. The indictment contained 57 counts, most of which named Isgro. The indictment charged Isgro with RICO violations, mail fraud, various conspiracies, payola, filing of false income tax returns, and obstruction of justice. Defendant Anderson was charged with mail fraud and conspiracy, and defendant Monka with filing false tax income returns and conspiracy.

The government's main witness before the grand jury was Dennis DiRicco, an attorney and accountant who has allegedly been a coconspirator with the defendants.[2] DiRicco had been charged and tried in federal district court in San Francisco in 1988 for charges involving money laundering and narcotics. DiRicco testified at his trial, and a transcript of his testimony was prepared at that time. The government and the defendants disagree over the exact content of this testimony, but it conflicted significantly with DiRicco's later testimony before the grand jury investigating Isgro, Anderson and Monka. In its published opinion dismissing the indictment, the district judge characterized DiRicco's testimony as follows:

> *That testimony constituted a complete and detailed denial of any wrongdoing not only by [DiRicco], but also by any of the defendants in this case.*
>
> Among other things, DiRicco *denied* in sworn testimony before his trial jury acquiring cash from drug dealers, *denied* taking that cash to Isgro personally, and *denied* sending it to him via Isgro's employee, David Michael Smith. Furthermore, DiRicco *denied* helping

---

[1] These facts are taken in large part from the district court's published opinion. *See United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990).

[2] DiRicco's testimony was clearly crucial to the indictment of his coconspirators. The district court concluded that, without DiRicco, only misdemeanor charges could have been brought against Isgro and no charges could have been filed against Anderson and Monka. DiRicco's significance to the prosecution is further illustrated by the extent of his testimony before the grand jury, totalling 164 transcript pages.

> cash couriers avoid security checks at San Francisco International Airport, *denied* conspiring with Isgro and others to defraud the Government of income tax, and *denied* conspiring with Isgro or anyone else to commit any crime. Evidently, that testimony had considerable effect on *his* jury since it only convicted him of two counts and acquitted him of eight counts.

United States v. Isgro, 751 F.Supp. 846, 847 (C.C.Cal. 1990) (emphasis in original).

The main prosecuting attorney in this case, William Lynch, received a copy of this transcript in April 1989. Mr. Lynch questioned DiRicco before the grand jury, and at that time extracted testimony from DiRicco that was "diametrically opposed to his prior trial testimony in every important respect," *Isgro*, 751 F.Supp. at 848. The government informed the grand jury that DiRicco had been convicted in a previous trial, but did not reveal that DiRicco had testified or that a transcript of that testimony had been prepared. As a result, the grand jury returned the indictment without the benefit of DiRicco's previous testimony.

During the course of pretrial proceedings, defendants' attorneys repeatedly asked the government for all exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). The government told the defense and the district court that all *Brady* material had either been released or would be released shortly before trial. The government neither produced the transcript nor acknowledged its existence; instead, it repeatedly denied the existence of material which would tend to exonerate the defendants. The government also assured the court that it fully understood its obligations to turn over any such materials.

Several weeks before trial, at the urging of the court, the government released a large amount of discovery to the defense. The material pertaining to DiRicco included a copy of statements made to the government after DiRicco had agreed to cooperate, but did not include either a copy of the trial transcript or an acknowledgment that the transcript existed.

Suspecting that despite its assurances the government was not revealing all exculpatory material, defense counsel finally conducted independent investigations and subsequently learned of the trial transcript's existence. However, the content of DiRicco's prior testimony was not discovered by defense counsel until the defendants' trial was well under way. At an August 28, 1990 appearance before the district court, defense counsel produced the transcript. Defense counsel asserted that the transcript contained material completely contrary to DiRicco's grand jury testimony and therefore constituted *Brady* material concealed by the government. Defendants asked that the court sanction the government. In response, prosecutor Lynch "flatly denied that there was any inconsistency between the two sets of testimony." *Isgro*, 751 F. Supp. at 848. The court ordered briefing on the question of DiRicco's inconsistencies.

After considering the briefs, the district court dismissed the indictment with prejudice. The court found that the government had misled the grand jury by not presenting DiRicco's testimony, had lied to the court about the existence and nature of the *Brady* material, and had intended to keep the material from the defense even through trial. On the basis of this cumulative misconduct, the court found dismissal with prejudice warranted. The government appeals.

DISCUSSION

A. *Introduction*

Federal courts draw their power to dismiss indictments from two sources. First, a court may dismiss an indictment if it perceives constitutional error that interferes with the grand jury's independence and the integrity of the grand jury proceeding. "Constitutional error is found where the 'structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice' to the defendant." *United States v. Larrazola*, 869 F.2d 1354, 1357-58 (9th Cir. 1989). Constitutional error may also be found "if [the] defendant can show a history of prosecutorial misconduct that is so systematic and pervasive that it affects the

fundamental eneksfairness of the proceeding or if the independence of the grand jury is substantially infringed." *Id.* at 1358.

Second, a district court may draw on its supervisory powers to dismiss an indictment. The supervisory powers doctrine "is premised on the inherent ability of the federal courts to formulate procedural rules not specifically required by the Constitution or Congress to supervise the administrative of justice." *id.* at 1358. Before it may invoke this power, a court must first find that the defendant is actually prejudiced by the misconduct. Absent such prejudice — that is, absent " 'grave' doubt that the decision to indict was free from the substantial influence of [the misconduct]" — a dismissal is not warranted. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988).

In this case, the district court dismissed the indictment because it found that the cumulative prosecutorial misconduct (1) usurped the role of the grand jury and violated the defendants' fundamental right to a fair proceeding, and (2) "resulted in a violation of the defendants' due process" rights sufficient to justify the use of its supervisory powers. *Isgro*, 751 F. Supp. at 851. The question before us is whether the district court erred in this judgment.[3] We review the district court's judgment de novo. *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991). *See also United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990) (noting intracircuit conflict on standard of review, and holding that because dismissals of indictments involve mixed questions of fact and law, de novo standard is appropriate.)

---

[3]The parties confuse this central question as they do battle in their briefs over what constitutes a *Brady* violation and what information falls within the protective scope of the Jencks Act. Although a *Brady* violation may be *indicative* of prosecutorial misconduct, we note that a *Brady* violation need not have occurred before a district court is justified in dismissing an indictment. Other prosecutorial misconduct can suffice: "Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role." *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979).

B. *Analysis*

1. *Applicability of Jencks Act*

[1] As an initial matter, the government argues that DiRicci's trial testimony was covered by Jencks Act, and that the government was not required to turn it over to the defense until DiRicco actually testified at trial. Therefore, it continues, its failure to disclose the transcript to the grand jury could not have been misconduct. We disagree.

The Jencks Act provides that in criminal prosecutions brought by the United States, no statement in the possession of the United States made by a government witness or prospective government witness may be the subject of discovery until that witness has testified at trial. *See* 18 U.S.C. § 3500(a),(b). The Act defines "statement" as follows:

> (e) The term "statement" . . . means—
>
> (a) a written statement made by any [government] witness and signed or otherwise adopted or approved by him:
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital or an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if made by said witness to a grand jury.

18 U.S.C. § 3500(e).

[2] The Ninth Circuit has not directly addressed the question whether trial testimony falls within the scope of the Jencks Act.[4] However, we have had occasion to discuss the purposes behind the Jencks Act: "In enacting the Jencks Act, Congress sought to

---

[4] Each case that the government cites for its position that "[i]t is undisputed that DiRicco's trial testimony . . . constitutes Jencks Act material," is simply inapposite. These cases merely discuss the *relationship* between the Jencks Act and *Brady* disclosure requirements; they do not address trial testimony at all.

protect government files against unwarranted intrusions prompted by the excessively expansive reading by some lower federal courts of the United States Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1953) (footnote omitted). This protection of government files is necessary to protect government witnesses from threats, bribery, and perjury." *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975). As the government acknowledges, a trial transcript is a matter of public record. Thus, in light of the purposes behind the Jencks Act, we fail to see why a trial transcript should be protected. Asking the government to make available a public record to the defense cannot compromise the internal workings of a prosecutor's office, nor does the government reveal information about a potential witness that is otherwise unavailable by complying with such a request.

[3] Our holding that trial testimony in not within the scope of the Jencks Act is supported by the language of the statute itself. By explicitly including *grand jury* testimony within the scope of the Act, *see* 18 U.S.C. § 3500(e)(3), the statute implicitly indicates that trial testimony is not covered. Grandjury proceedings are conducted in secrecy; thus, protecting grand jury testimony makes sense in light of the purpose of the Act noted above. Grand jury testimony would not otherwise be available to the public, while trial testimony is a matter of public record.

[4] We note as well that at least two other circuits have concluded that trial transcripts are not covered by the Jencks Act. *See United States v. Harris*, 542 F.2d 1283, 1293 (7th Cir. 1976), *cert. denied sub nom Clay v. United States*, 430 U.S. 934 (1977) ("a transcript of a witness' testimony in a prior trial is not within the Jencks Act"); *United States v. Baker*, 358 F.2d 18, 20 (7th Cir.), *cert. denied*, 385 U.S. 869 (1966) (same); *United States v. Munroe*, 421 F.2d 644, 645 (5th Cir. 1970), *cert. denied*, 400 U.S. 851 (1970) (same). We join the Seventh and Fifth Circuits in holding that previous trial testimony does not fall within the scope of the Jencks Act. The government cannot justify or excuse its misconduct in this case by invoking the Act.

2. *Dismissal of the Indictment*

a. *Constitutional Gounds*

The district court found that the government's failure to present DiRicco's trial testimony was a usurpation of the grand jury's role to determine whether the defendants should be indicted. According to the district court, by intentionally keeping this information from the jury,[5] the government "usurped the function of the Grand Jury, caused fundamental unfairness to arise in the indicting process, and violated the defendants' constitutional rights to a fair Grand Jury hearing." *Isgro*, 751 F.Supp. at 851.

[5] The problem with the district court's judgment is that this court has held that prosecutors simply have no duty to present exculpatory evidence to grand juries. *See Larrazolo*, 869 F.2d at 1359; *United States v. Al Mudarris*, 695 F.2d 1182, 1186 (9th Cir.) ("The prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witnesses or any exculpatory evidence."), *cert. denied*, 461 U.S. 932 (1983) (citing *United States v. Tham*, 665 F.2d 855, 862 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982)). Most importantly, the Supreme Court, in a case decided after the district court rendered its decision in this case, has reaffirmed this rule. *See United States v. Williams*, 60 U.S.L.W. 4348 (May 4, 1992).

In *Williams*, the government charged and indicted defendant Williams with making false statements for the purpose of influencing a financial institution in violation of 18 U.S.C. § 1014. According to the indictment, Williams supplied several banks with false information that overstated the value of his assets and income. The prosecutors did not present to the grand jury evidence such as Williams' tax records and general ledgers tending to belie an attempt to mislead the banks, i.e., to prove his innocence. The district court held that this omission was sufficient basis to justify a dismissal of the indictment. In affirming the district court, the Tenth Circuit affirmed its rule that prosecutors have a duty to present "substantial exculpatory evidence" to the

---

[5] There seems to have been no doubt whatsoever in the district court's mind that the government was fully aware of DiRicco's trial testimony and intimately familiar with its contents. *Isgro*, 751 F.Supp. at 850.

grand jury, and that their failure might under certain circumstances justify the dismissal of an indictment. The Supreme Court reversed.

The Court rejected Williams' argument that the Tenth Circuit's rule was "a necessary means of assuring the constitutional right to the judgment 'of an independent and informed grand jury.'" *Williams*, 60 U.S.L.W. 4352 (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)). Focussing on the grand jury's role as an accusatory rather than adjudicatory body, the Court noted that the grand jury's role was only "to assess whether there is adequate basis for bringing a criminal charge," not to determine guilt or innocence. *Id.* at 4353. Thus, the "suspect under investigation by the grand jury [has never] been thought to have a right to testify, *or to have exculpatory evidence presented.*" *Id.* (emphasis added). In short, the Court found that "[i]mposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with [the grand jury] system." *Id.*

We believe that *Williams* controls here. As in *Williams*, the defendants' constitutional argument in this case is that the grand jury was deprived of its ability to make an informed or independent decision by the prosecutor's failure to present exculpatory evidence. However, in fairly expansive language, *Williams* clearly rejects the idea that there exists a right to such "fair" or "objective" grand jury deliberations. *See also United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983) ("[W]e disagree with [the district court] that the grand jury could not have returned an informed indictment because the prosecutor failed to introduce... allegedly exculpatory evidence."), *cert. denied*, 465 U.S. 1079 (1984). Therefore, we find that there was no abrogation of constitutional rights sufficient to support the dismissal of the indictment.

b. *Supervisory Powers*

[6] The district court also invoked its inherent supervisory power to dismiss the indictment because it found that in addition to usurping the role of the grand jury, the government had repeatedly denied to defense counsel and to the court the existence of any *Brady* material, had misrepresented the contents of

the transcript when confronted with it, and had intended to keep the transcript from the defense as long as it could, possibly through trial. The court also cited the facts that the government prosecutors were intimately familiar with the trial transcript and only pretended not to know its contents, and that some time ago then-District Judge Rymer had dismissed an indictment for prosecutorial misconduct by these same Strike Force attorneys in a related case.

[7] Although the district court was justifiably frustrated with the government prosecutors in this case, we simply do not find support in Supreme Court and Ninth Circuit case law for its decision to dismiss the indictment.

In dismissing the indictment on these grounds, the district court was apparently of the view that "[W]hile a constitutional analysis focuses on preserving fairness for the individual defendant and remedying any harm that has been done to his basic rights, the exercise of a court's inherent supervisory power serves two institutional purposes: deterring governmental misconduct and protecting the integrity of the judicial process." *Sears Roebuck*, 719 F.2d at 1394 (Norris, J., dissenting in part from the judgment). Under this view, dismissal of the indictment need not be tied to prejudice to the defendant.

[8] In its recent jurisprudence, however, the Supreme Court has moved away from this view and toward a rule that a court should not use its supervisory powers to mete out punishment absent *prejudice* to a defendant. For example, in *United States v. Hastings*, 461 U.S. 499, 504-507 (1983), the Court held that the Seventh Circuit could not reverse a conviction on the basis of prosecutorial comment on a defendant's silence without first considering whether such comments were prejudicial. The Court rejected the Seventh Circuit's reasoning that a reversal was warranted because although it had repeatedly warned local prosecutors that such comments were unconstitutional, its admonitions were being ignored. *Hastings* thus unequivocally rejects the idea that a court may sanction the government for its misconduct without considering first the actual prejudice suffered by the defendant.

[9] Dismissal of an indictment with prejudice necessarily implicates separation-of-powers principles. *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991); *United States v. Gatto*, 763 F.2d 1040, 1046 (9th Cir. 1985). This doctrine mandates judicial respect for the independence of the prosecutor. *Simpson*, 927 F.2d at 1091. Dismissal of an indictment with prejudice is the most severe sanction possible. Such dismissal exercised under the guise of "supervisory power" is impermissible absent "a clear basis in fact and law for doing so." *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir. 1977). In deciding whether to dismiss an indictment, a court must not only determine whether a defendant has suffered actual prejudice, it must also limit its consideration to those events that actually bear upon *the grand jury's decision to indict.* In *Bank of Nova Scotia*, 487 U.S. 250, the Supreme Court affirmed the Tenth Circuit's reversal of a district court decision to dismiss an indictment. The Court agreed with the Tenth Circuit that the defendant has not been prejudiced when the prosecution had violated F.R.Crim.P. 6(e) by, *inter alia*, disclosing grand jury materials to IRS employees having civil tax enforcement responsibilities, failing to notify the court promptly of such disclosures, and disclosing to potential witnesses the names of the suspects, as well as F.R.Crim.P. 6(d) in allowing joint appearances of witnesses before the grand jury. Significantly, the Court explicitly approved the Tenth Circuit's holding that *post-indictment* prosecutorial misconduct should not be a factor in determining whether a defendant was prejudiced:

> The Court of Appeals concluded that the District Court's findings of Sixth Amendment postindictment violations were unrelated to the grand jury's independence and decisionmaking process because the alleged violations occurred *after* the indictment. We agree that it was improper for the District Court to cite such matters in dismissing the indictment.

Bank of Nova Scotia, 487 U.S. at 258 (emphasis in original). Similarly, in *Spillone*, 879 F.2d 514, the defendant argued before the Ninth Circuit that a dismissal was proper in part because the prosecutor had delayed in giving defense counsel certain *Brady* material. We stated that "[t]o ask for a dismissal of the indictment on this ground is unwarranted," *id* at 522, reasoning that the

government's failure to comply with its duty to disclose exculp tory evidence at trial "was not sufficient to justify a dismissal the indictment." *Id. See also Williams*, 60 U.S.L.W. at 43 ("the supervisory power can be used to dismiss an indictme *because of misconduct before the grand jury*") (quoting *Unit States v. Mechanik*, 475 U.S. 66, 74 (1989)) (emphasis added)

[10] In this case, the cumulative conduct complained of w not limited to the grand jury proceedings. The government failure to turn over the trial transcript and its misrepresentatio to the defense and the court regarding its existence and conten all took place after the indictment was obtained. The only condu directly affecting the grand jury process was the government failure to present DiRicco's previous testimony transcript to t jury. After *Williams*, that failure is simply insufficient to sustain dismissal of an otherwise valid indictment.[6]

[11] Even if all the misconduct could be considered, it difficult to identify the prejudice to the defendants. As discusse above, there was no constitutional violation associated with t grand jury proceeding. As the government points out, with respe to the failure to turn over the *Brady* material, that material was the end made available to the defense well before trial. In fac should the indictment be reinstated, it is conceivable that t

---

[6] The defendants rely mainly on two cases, *United States v. Samang* 607 F.2d (9th Cir. 1979) and *United States v. Basurto*, 497 F.2d 7 (9th Cir. 1974). In *Basurto*, we held that an indictment was proper dismissed when the defendants had to stand trial on the basis of a indictment which the government knew was based in part on perjure testimony. In *Samango*, we approved a dismissal when the prosecut gave the grand jury a transcript of misleading and highly prejudici testimony without alerting it to the witness's credibility problems an pressured the jury through its foreperson to reach a decision in a ver short period of time. Significantly, in both those cases, dismissal wa based on misconduct confined to the grand jury proceeding and tha improperly influenced the grand jury's decision to return an indictmen In this case, by contrast, although the failure to present the exculpato evidence may have influenced the grand jury's decision to indic defendants have not suffered actual prejudice because they had no righ to have such evidence presented.

defendants could be acquitted at trial. Therefore, the defendants have suffered no prejudice, at least not in the sense the Supreme Court has defined "prejudice" in this context: "Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256[7]

[12] Finally, the Supreme Court as well as the Ninth Circuit has repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure. Accordingly, the Supreme Court has cautioned that when faced with prosecutorial misconduct, a court should "tailor[ ] relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). As the Court observed in *Bank of Nova Scotia:*

> Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of [F.R.Crim P] 6 may be punished as a contempt of court.... In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

487 U.S. at 263. In this case, the prosecutors' misconduct before the district court clearly rose to an intolerable level, particularly the miscounduct of Mr. Lynch. Under the circumstances, we

---

[7] At oral argument, defense counsel was asked to identify the actual prejudice defendants have suffered. Counsel responded that because the indictment was not dismissed immediately, defendants will be prejudiced by a reinstatement because they revealed trial strategy to the government during pretrial proceedings. We appreciate that this may indeed prove to be a disadvantage on remand. Nevertheless, prejudice of that sort cannot be said to have "substantially influenced the grand jury's decision to indict" and therefore does not fall within the meaning of "prejudice" as set out in *Bank of Nova Scotia.*

believe that the district court would be quite justified in pursuing alternative means of sanctioning the prosecutor, as indicated in *Bank of Nova Scotia*. The Attorney General should examine the conduct of Mr. Lynch to consider whether or not he should be subject to departmental discipline as well. Finally, we note that Mr. Lynch must also bear the serious sanction of published opinions chastising him by name. However, dismissing the indictment is simply an unwarranted "windfall" to the defendants.

CONCLUSION

We are sympathetic to the district court's frustration with the government conduct in this case, in particular to its sense that it was unable to control the conduct in its courtroom. We join that court in condemning the government's behavior. However, under the Supreme Court's recent decision in *United States v. Williams*, and the definition of "prejudice" it has set out in *Bank of Nova Scotia*, we have no choice but to find that the district court erred in dismissing the indictment with prejudice. Accordingly, the district court's judgment is REVERSED.

APPENDIX 2

UNITED STATES OF AMERICA, *Plaintiff,*

v.

JOSEPH ISGRO, RAYMOND ANDERSON, and JEFFREY S. MONKA, *Defendants,*

No. CR-89-951-JMI.

United States District Court, C.D. California.

Sept. 4, 1990.

Defendants were charged by indictment with, inter alia, Racketeer Influenced and Corrupt Organization Act violations, mail fraud, filing of false income tax returns, and obstruction of justice. The District Court, Ideman, J., entered order declaring mistrial and dismissing indictment with prejudice due to: (1) prosecutorial misconduct relating to concealment of prior sworn testimony of Government's main witness, in a criminal prosecution of that witness, that was diametrically opposed to the witness' present testimony, and (2) in the exercise of the court's inherent supervisory power to dismiss an improper indictment to insure fundamental fairness.

So ordered.

1. Criminal Law — 700(8)
Indictment and Information — 144.1(2)

A prosecution of a Racketeer Influenced and Corrupt Organization defendant would be dismissed with prejudice for prosecutorial misconduct relating to the concealment of the prior sworn testimony of the Government's main witness, in a criminal prosecution of that witness, that was diametrically opposed to his present testimony; Government usurped functions of grand jury by failing to disclose substance of prior testimony and improperly failed to disclose the prior testimony as *Brady* material. U.S.C.A. Const. Amend. 5.

2. Federal Courts — 3

District Court would exercise its inherent supervisory power to dismiss indictment against defendant to insure fundamental fairness of judicial proceedings and due to fact that prosecutorial

actions had resulted in violation of defendants' due process rights; Government had concealed prior sworn testimony of its main witness, carefully failed to reveal that the main witness had testified at his own trial telling a story completely exonerating the defendant, the withheld testimony was crucial to the defense case. Government engaged in act of misrepresentation regarding the existence of *Brady* material, and it was not first instance of misconduct by prosecuting attorneys in the case. U.S.C.A. Const. Amend. 5.

3. Criminal Law — 627.8(2), 700(5)

Transcript of prior sworn testimony of Government's main witness in a Racketeer Influenced and Corrupt Organization prosecution, in a criminal prosecution of that witness, that was diametrically opposed to his present testimony, was not subject to Jencks Act preclusion from discovery until after the witness had testified on direct examination on basis that the transcript was merely a witness' statement; *Brady* material can be composed of inconsistent statements of witnesses. 18 U.S.C.A. § 3500.

4. Criminal Law — 700(4)

Transcript of former testimony by government's main witness in a criminal prosecution of that witness that was diametrically opposed to his present testimony was not a "public record" available to defense and thus not required to be produced under *Brady*; Government was careful throughout pendency of case not to mention that the witness testified at his own trial, and defense was continually lulled by Government with false assurances that exculpatory evidence did not exist.

William S. Lynch, Sr. Counsel for Litigation, Dept, of Justice, Drew S. Pitt, Asst. U.S. Atty., Organized Crime Strike Force, Los Angeles, Cal., for plaintiff.

Donald M. Re, Los Angeles, Cal., for Isgro.

Michael W. Mayock, Pasadena, Cal., for Anderson.

Gerson Horn, Beverly Hills, Cal., for Monka.

OPINION AND ORDER DISMISSING CASE WITH PREJUDICE

IDEMAN, District Judge.

IT IS HEREBY ORDERED:

The Court hereby DISMISSES WITH PREJUDICE the above-entitled action.

I. BACKGROUND FACTS

Defendants JOSEPH ISGRO, RAYMOND ANDERSON, and JEFFREY S. MONKA (hereinafter defendants, collectively) were indicted by the Grand Jury on November 30, 1989. The indictment contained 57 counts. Of those, only counts 21 through 24, inclusive, named RAYMOND ANDERSON and only counts 45 and 52 through 57, inclusive, named JEFFREY MONKA. JOSEPH ISGRO is named in 51 of the 57 counts. The indictment charged ISGRO with RICO violations, mail fraud, various conspiracies, payola, filing of false income tax returns, and obstruction of justice. ANDERSON was charged with mail fraud and conspiracy. MONKA was charged with filing false tax returns and conspiracy.

The prosecution of this case was handled by attorneys William S. Lynch and Drew S. Pitt from the Organized Crime Strike Force of the Department of Justice. Throughout the pretrial period, defendants repeatedly sought discovery of exculpatory material under *Brady v. Maryland*, 373 U.S 83, 87-88, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). The Government told the defense and the Court that all *Brady* material either had been released or would be released shortly before trial. Any delay was attributable to threats to a protected witness. Additionally, upon urging of the Court, the Government released Jencks Act material two weeks prior to trial.

The Government's main witness in this case was Dennis DiRicco, an attorney/accountant, and an alleged unindicted coconspirator. In late 1988, DiRicco was tried in the Federal District Court in the Northern District of California for charges involving money laundering and narcotics. Although DiRicco

testified in his own defense at his trial and a transcript of his testimony was prepared, the Government never disclosed these facts to these defendants and this Court.

In April, 1989, Mr. Lynch received a copy of that transcript. He read the transcript and, with considerable understatement, said that he "noted some areas in the transcript that he wanted to question Mr. DiRicco about." Indeed, much of DiRicco's testimony contained statements which a prosecutor would certainly want to discuss with him if that prosecutor was considering using him as a witness against these defendants. In fact, that *testimony constituted a complete and detailed denial of any wrongdoing not only by himself, but also by any of the defendants in this case.*

Among other things, DeRicco *denied* in sworn testimony before his trial jury acquiring cash from drug dealers, *denied* taking that cash to ISGRO personally, and *denied* sending it to him via ISGRO's employee, David Michael Smith. Furthermore, DiRicco *denied* helping cash couriers avoid security checks at San Francisco International Airport, *denied* conspiring with ISGRO and others to defraud the Government of income tax, and *denied* conspiring with ISGRO or anyone else to commit any crime. Evidently, that testimony had considerable effect on *his* jury since it only convicted him of two counts and acquitted him of eight counts.

Whether or not any questioning of DeRicco by Mr. Lynch took place, what was said, and the results, if any, are not known to this Court. In any event, four months later, in August, 1989, Mr. Lynch called DiRicco before the Grand Jury in this case as a witness. Personally handling the questioning of DiRicco, Mr. Lynch extracted a story from him that was diametrically opposed to his prior trial testimony in every important respect. Yes, DiRicco now swore, he *had* received cash from drug dealers, yes, he *had* supplied said cash to ISGRO for criminal purposes, and yes, he *had* delivered it to ISGRO personally and by way of Mr. Smith. Yes, he *had* further helped cash couriers avoid security at the San Francisco International Airport, and yes, he *had* conspired with ISGRO and others to defraud the Government and record companies. Moreover, DiRicco described phony paper transactions set up by himself, ISGRO, and others which

were false and part of the criminal scheme. And yes, ANDERSON and MONKA were in on it too.

Despite this dramatic 180 degree switch from DiRicco's former sworn trial testimony, Mr. Lynch failed to reveal any of that prior testimony to the Grand Jury. He neither asked DiRicco about it before the Grand Jury, nor read the prior testimony to the Grand Jury. In fact, although the Government informed the Grand Jury that the witness had been convicted and had made a plea agreement, the Government failed to tell the Grand Jury that DiRicco had *testified* at his trial, much less that a *transcript* had been prepared and was available. Thereafter, the Grand Jury returned the indictment herein and the case was assigned to this Court.

During the pendency of the trial, defendants made numerous discovery motions, requesting any *Brady* material, among other things. Counsel for the Government neither produced DiRicco's trial transcript nor acknowledged its existence. Instead, the prosecution repeatedly denied the existence of material which would tend to exonerate the defendants, i.e. *Brady* material. Furthermore, Government counsel solemnly assured this Court that they fully understood their obligation to furnish such material to the defense and that they would certainly do so if any material was found. Unfortunately, said the Government, there just didn't exist any material of that nature. (When these representations were made, the Government had been in possession of DiRicco's trial transcript for over a year.)

Approximately three weeks before trial began, the Government turned over a large amount of discovery to the defense, including some material pertaining to DiRicco. This material consisted of a copy of DiRicco's statements to the Government made *after* he had agreed to cooperate. However, this material included neither a copy of the trial transcript, nor any acknowledgment of its existence.

Defense counsel finally investigated on their own for possible evidence that might exist in the courthouse in the Northern District of California. Defendants thus learned for the first time that DiRicco had testified at his trial and that a transcript of his

testimony existed. Defense counsel were then able to procure a copy of that transcript.

On August 28, 1990, in a chambers conference during the trial, defense counsel produced a copy of the transcript and represented to the Court that it contained material completely contrary to DiRicco's Grand Jury testimony and thus constituted *Brady* material heretofore concealed by the Government. Defendants asserted that the prosecution had failed to comply with its discovery obligations and promises, and, further, that the prosecution had knowingly and repeatedly made misrepresentations to the Court and defense counsel. Finally, defendants requested sanctions against the Government.

In response, Mr. Lynch flatly denied that there was any inconsistency between the two sets of testimony. Thereafter the Court ordered briefing on the subject. Both sides presented briefs. Defendants' brief contained a detailed, page-by-page comparison between the trial testimony and the Grand Jury testimony, showing beyond a doubt that the two sets of testimony were completely contrary to each other. Again, the defense brief asserted that the Government had acted improperly and that sanctions should be imposed.

The Government's brief wisely retreated from the prosecution's original position that the material was not contradictory, and thus not impeaching. The Government's position now was that Mr. Lynch had only read the material once, suggesting that he was not really familiar with it, and besides, it was a public record available to the defendants. This claim of availability as a public record did not mention that the Government had failed to divulge the very existence of the transcript and had, through evasions and half-truths, given the impression that no such record existed.

II.

ISSUES

The first issue in this case is whether the prosecution has usurped the functions of the Grand Jury by its actions so as to deprive defendants of their Fifth Amendment rights to a fair hearing by an impartial and independent Grand Jury.

The second issue in this case is whether the Court should exercise its inherent supervisory powers to dimiss the indictment in this action due to a pattern of outrageous Government misconduct.

III.

ANALYSIS

Defendants contend that dismissal with prejudice is warranted for a variety of reasons. First, they claim that the failure of the government at the Grand Jury hearing to present the prior sworn contrary testimony of their main witness, Dennis DiRicco, or even to make the Grand Jury aware that such testimony existed, denies the defendants a fair hearing before that Grand Jury. They contend that the lack of a fair hearing denies them due process guarantees under the Fifth Amendment of the United States Constitution and, therefore, dismissal of the indictment is warranted on constitutional grounds.

Moreover, defendants move to dismiss on the grounds that the above-mentioned conduct by the Government before the Grand Jury together with the repeated refusal of the prosecution to provide DiRicco's prior testimony or to even acknowledge its existence — indeed, its *denial* of the existence of *Brady* material — constitutes outrageous governmental conduct. Defendants contend that these actions justify dismissal based upon the inherent supervisory power of the Court. As an additional aggravating factor, defendants point to an earlier action in this case by Judge Rymer wherein she dismissed the indictment against another defendant. She found that the Government had committed outrageous misconduct as to her, involving misrepresentations to the Court and impermissible coercion of the defendant and her

husband, the latter being a witness called at this trial against these defendants. Therefore, defendants seek a dismissal on either or both grounds *with prejudice.*

Usurpation of Grand Jury Functions

[1] In regards to usurpation of the functions of the Grand Jury, courts have long held that the independence of the Grand Jury must be carefully guarded. *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273-74, 4 L.Ed.2d 252 (1960); *United States v. Samango*, 607 F.2d 877, 882 (9th Cir. 1979).

In *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974), the Supreme Court held that the District Court has jurisdiction to oversee the Grand Jury process and to insure its independence. *Id.* at 346, 94 S.Ct. at 619; *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir.1972).

Courts rarely dismiss an indictment for prosecutorial misconduct in order to avoid encroaching on the independence of prosecutors and grand juries. *Samango, supra*, at 881. However, the Ninth Circuit has held that dismissal is a proper remedy in cases of flagrant overreaching or deception by the prosecution: "Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role" *Id.* at 882. As previously noted, the prosecutorial behavior in this case was intentional.

The Supreme Court has recently articulated a test to determine whether the Grand Jury indictment should be dismissed. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988). Courts may dismiss indictments when the " 'violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations, [Cites omitted.]" *Bank of Nova Scotia, supra*, at 256, 108 S.Ct. at 2374.

In its brief, the Government makes the following contentions: (i) With respect to the Grand Jury proceedings, the Government asserts that impeachment of a witness in the Grand Jury is not

required; (ii) Even if it were required, the Government contends that dismissal of the indictment is not the proper remedy; and (iii) The prosecution implies, but does not claim, that Government counsel may not have had an accurate recollection of the contents of DiRicco's trial testimony.

Taking the last assertion first, this Court believes that whatever be the failings of Government counsel, lack of diligent preparation and inattention to detail are not among them. Government counsel have impressed the Court with an encyclopedic knowledge of the facts of the case. The Court, naturally, has no way of ascertaining how many times and with what degree of thoroughness a Government attorney examines an item of evidence. Given the importance attached to this case by the Government and the large amount of time and effort spent by the prosecution in preparation, there is not the slightest doubt in the mind of this Court that Government counsel were at all times completely familiar with the contents of their chief witness' trial testimony. The Court rejects any implication to the contrary.

In regards to the lack of a requirement to impeach a Grand Jury witness, it is correct that, standing alone, such is often true. However, the Supreme Court and other federal courts, including those in the Ninth Circuit, have been concerned on occasion with possible usurpation of the function of the Grand Jury by the prosecution. The fear is that a Grand Jury sufficiently controlled by the Government thus becomes a kind of "rubber stamp" for the wishes of the prosecutor. The Fifth Amendment Due Process clause of the Constitution guarantees citizens who are to be charged with serious crimes in the federal courts the right to have their cases screened by a Grand Jury of their fellow citizens before being put on trial. If the presentation to the Grand Jury is done unfairly and essential information is withheld, the Grand Jury is thus unable to make a decision based on a fair assessment of the evidence. Then the indictment in fact becomes the decision of the prosecutor and not of the Grand Jury, thereby causing fundamental unfairness and a violation of a defendant's constitutional rights.

Consider the situation here: The charges are very serious, particularly with respect to ISGRO, including a RICO claim with

severe criminal and civil penalties. The witness, DiRicco, is probably the only one who can prove much, or all, of the RICO violations alleged, as well as numerous other counts against ISGRO. Codefendants ANDERSON and MONKA probably could not have been indicted at all absent the testimony of DiRicco. Furthermore, the witness is already in a suspect category: He has been convicted of felonies and has made a plea agreement with the Government whereby the Government has something to say about his eventual sentencing. Thus, DiRicco has great motivation to conform his testimony to attempt to please the Government.

Courts routinely caution juries to consider such facts as plea agreements in weighing the credibility of witnesses for just this reason. If the Grand Jury had known that DiRicco had testified under oath at a prior time to a entirely different set of facts that served his interests at that earlier time, the Grand Jury's evaluation of his contrary testimony before them, again at a time when a contrary version served his needs, that knowledge would have a strong potential of adversely affecting their evaluation of his credibility.

The Government certainly must think so. It kept that contradictory information from the Grand Jury for the same reason it attempted to keep it from the trial jury; They feared the devastating effect it would probably have had on DiRicco's credibility. This Court cannot say with certainty what the Grand Jury would have done if it had known the full story. However, the Court can say that the decision was for the Grand Jury to make, *not* the prosecution. By making the decision for the Grand Jury, the Government usurped the function of the Grand Jury, caused fundamental unfairness to arise in the indicting process, and violated the defendants' constitutional rights to a fair Grand Jury hearing.

Contrary to the Government's assertion that dismissal of the indictment is not the remedy for its misconduct in the presentation to the Grand Jury, the Court finds that dismissal with prejudice is precisely the remedy called for since said failure to disclose constitutes constitutional error, under the facts of this case.

The Court's Inherent Supervisory Power

[2] An alternative ground for dismissal of this case is found in the Court's inherent supervisory power to dismiss an improper indictment in its obligation to ensure the fundamental fairness of judicial proceedings. The Ninth Circuit has long held that the District Courts have an inherent supervisory power to dismiss an indictment for either prosecutorial misconduct or violation of constitutional due process. *United States v. Basurto,* 497 F.2d 781, 785 (9th Cir.1974); *United States v. Samango,* 607 F.2d 877, 884 (9th Cir.1979).

The Supreme Court has recently held that District Courts may *not* invoke their supervisory powers merely to correct harmless error. *Bank of Nova Scotia, supra,* at 255-56, 108 S.Ct. at 2374.

The Due Process clause of the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."

In the present case, this Court chooses to exercise its supervisory power not only because of the usurpation discussed above, but also because of various other actions taken by the Government in prosecuting this matter. These prosecutorial actions have resulted in violation of the defendants' due process under the Constitution.

First, the Government withheld vital evidence from the Grand Jury which indicted the defendants, as discussed above. Next, the Government carefully failed to reveal that the main prosecution witness, DiRicco, had testified at his own prior trial, telling a story completely exonerating these defendants. Also, the Government continually misrepresented the existence of this *Brady* material to defendants' counsel and to the Court, despite ongoing requests. Upon being confronted finally with its false statements to Court and counsel, the Government's reaction was to stonewall and simply deny the obvious.

[3] Moreover, the Government's contentions relating to the failure to disclose the prior testimony as *Brady* material are to the effect that the transcript is merely a witness' statement and, as such, subject to the Jencks Act and not discoverable until after

the witness has testified on direct examination. The prosecution hints (but, carefully, does not claim) that they would have turned it over at that time and then implied, in effect: No harm, no foul; the defense has it now, even earlier than they are entitled to it!

The Court finds these positions untenable. It is clear that *Brady* material can be composed of inconsistent statements of witnesses, *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Bagley,* 473 U.S. 667, 675-76, 105 S.Ct. 3375, 3379-81, 87 L.Ed.2d 481 (1985); and *United States v. Shaffer,* 789 F.2d 682, 687 (9th Cir. 1986). The Government denies that it had *Brady* material on numerous occasions and claims that it turned over what it considered to be Jencks material on DiRicco and other witnesses before trial. How would the Government explain turning over the prior trial transcript when DiRicco testified at trial, having planted its feet clearly in the concrete of denying the existence of *Brady* material and that the Jencks material had already been turned over? The Government's lack of good faith appears clearly in their reaction upon finding out that the defense had obtained the trial transcript. That reaction was to deny that *anything* in that transcript constituted a prior inconsistent statement. Thus, having been caught with a smoking pistol, the Government, having previously denied that it had a pistol, now denied that the pistol smoked.

[4] The Government then attempts to further cloud the issues by contending that the transcript of the former testimony is a "public record" available to the defense and thus, the prosecution need not have produced it under *Brady.* What this argument overlooks is that one needs to know of the *existence* of a public record before one can obtain and read it. The Government has been very careful throughout the pendency of this case not to mention that DiRicco testified at his own trial. It is noteworthy that the trial occurred in the Northern District of California and that the records are therefore in a courthouse hundreds of miles from this Los Angeles courthouse. Also, where the defense is continually lulled by the Government with false assurances that exculpatory evidence does not exist, it cannot be said that their failure (at first) to find such evidence excuses the Government from its obligations to provide it.

It is the belief and finding of this Court, contrary to the Government's hint that they would have provided this material, that it was the Government's intent not to ever provide this material to the defense, for the same reason that it was withheld from the Grand Jury: The prosecution feared the effect it would have upon DiRicco's credibility, and, thus, their case.

Moreover, the withheld evidence of DiRicco's testimony is crucial to the defense case. This testimony completely exonerates all the defendants while showing the Government's main witness to be a perjurer (either at his trial or before the Grand Jury). The testimony of Mr. DiRicco is *the most important prosecution testimony* in this case. Without said testimony, the two minor defendants, Anderson and Monka, could not have been indicted at all. Moreover, the major defendant, ISGRO, could have only been indicted on misdemeanor payola charges.

Furthermore, the Government engaged in active misrepresentation to the Court regarding the existence of *Brady* material. The Government explicitly told the Court that all *Brady* material had been turned over to the defense.

Finally, the Court notes that this is not the first instance of misconduct by the prosecuting attorneys in this case. The Court's attention has been drawn to an earlier incident in a related case, *United States v. Valeria Tashjian*, CR-88-124(B) PAR, wherein the Strike Force attorneys were found by Judge Rymer to have been guilty of outrageous governmental misconduct by coercive tactics used towards a defendant and by misrepresentations to Judge Rymer to such a degree that she dismissed the indictment as to that defendant.

The Court finds that there has been outrageous governmental misconduct in this case to the extent that the exercise of the supervisory power of the Court to insure that the ends of justice shall prevail should be exercised.

Regrettably, this Court must agree with Judge Rymer wherein she said: "... it is clear that the course of conduct of the Strike Force lawyers falls well below the standard of conduct expected of government prosecutors."

Therefore, the Court hereby orders that a mistrial be declared and that the indictment be dismissed with prejudice.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-1176

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH ISGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1176

JOSEPH ISGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing an indictment on the ground of prosecutorial misconduct.

1. On November 30, 1989, petitioner was indicted on 51 counts by a grand jury sitting in the Central District of California. He was charged with a variety of offenses arising from a scheme to promote musical artists illegally through "payola," *i.e.*, payments to officials at local radio stations, with funds derived from narcotics trafficking. Pet. App. 5a, 21a.

Dennis DiRicco, an alleged unindicted co-conspirator who was an attorney and accountant, testified before the grand jury and was scheduled to testify as a government witness at trial. In 1988, DiRicco was tried in the United States District Court for the Northern District of California on charges involving money laundering and narcotics. DiRicco testified at his trial, and a transcript of his testimony was prepared at that time. Pet. App. 6a.

The prosecutor informed the grand jury that DiRicco had been convicted, but he did not reveal that DiRicco had testified at his trial. The prosecutor also did not include a copy of the trial transcript or acknowledge that the transcript existed when he responded to petitioner's pretrial request for exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). On August 28, 1990, during petitioner's trial, petitioner's attorney advised the court that he had obtained a copy of the transcript of DiRicco's testimony, and he asserted that the transcript was additional *Brady* material that should have been provided to him before trial. Petitioner's counsel requested sanctions against the government for its failure to produce the transcript before trial. Pet. App. 7a-8a.

On September 4, 1990, the district court dismissed the indictment with prejudice. The court concluded that the prosecutor had misled the grand jury by not presenting DiRicco's testimony, that he had lied to the court about the existence of *Brady* material, and that he had intended to keep the transcript from petitioner during the trial. The court ruled that the prosecutor had usurped the function of the grand jury

and had violated petitioner's constitutional right to a fair consideration of the case by the grand jury. Alternatively, the court found that it could exercise its inherent supervisory power to dismiss the indictment to ensure the fundamental fairness of judicial proceedings. Pet. App. 19a-32a.

2. The court of appeals reversed. Pet. App. 1a-18a. The court found that the prosecutor's failure to present DiRicco's trial transcript to the grand jury was not a usurpation of the grand jury's functions, because there is no duty to present exculpatory evidence to the grand jury. The court also ruled that the district court could not use its supervisory powers to dismiss the indictment in the absence of identifiable prejudice to petitioner.

3. Petitioner contends (Pet. 4-7) that the court of appeals improperly limited the district court's authority to dismiss indictments in the exercise of its supervisory power and that the court of appeals effectively ruled that post-indictment prosecutorial misconduct can never be the basis for dismissal of an indictment.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of

certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1993

---

* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.